In the High Court of Uttaranchal,
At Nainital.
Criminal Appeal No. 435/2001
(Old No. 2930/1982)

Sabir Ahmad S/o Sadiq,
R/o Heena, Patti, Barhart, P.S.
Uttarkashi,
District Uttarkashi ... Appellant.

Versus

State of U.P. . Respondent.

Sri Lokendra Dobhal, learned counsel for the appellant.
Sri A. Rab, learned Addl. G.A. for the respondent.

Hon'ble B.C. Kandpal, J.

This criminal appeal, U/S 374(2) of Code of Criminal Procedure, 1973, is directed against the judgment and order dated 4-11-1982, passed by Sessions Judge Uttarkashi, in S.T. No. 3/1982, convicting the accused/appellant U.S 376 I.P.C. and sentencing him to suffer R.I. for five years.

2- The prosecution case in brief is that on 19-3-1981 Km. Beena D/o Jog Bahadur Nepali had gone to the fields in village Huna for plucking vegetables. At about 2 P.M. accused Sabir Ahmad reached there, caught hold of her and forcibly commited rape on her in the nearby shrubs. The occurrence was seen by Kunwar Singh, Dayal Singh and Gaur Singh. The prosecutrix informed her father about the occurrence to took her to Police Out Post Maneri and lodged the F.I.R., Ext. Ka.1 on the same day at 8.50 P.M. The case was registered against the accused on the same day vide G.D. at report No. 16, Ext. Ka.5. On 19-3-1981 Head Moharir Meharwan Singh also took into possession the blood-stained Dhoti of the prosecutrix and piece of Saree vide memo Ext. Ka.5. The S.I. V.P. Kukreti

started investigation in the case. On 20-3-1981 the I.O. took into possession the Paijama worn by the accused and prepared Far, Ext. Ka.6. On the pointing of the accused the I.O. also took into possession a bag and three clothe pieces having blood-stains from the place of the occurrence and also took into possession plain earth and blood-stained earth and prepare recovery memo Ext. Ka.7. The I.O. also prepared memo regarding confession made by the accused for the recovery of the bag and clothe pieces. The I.O. also prepared site plan, Ext. Ka. 8 of the place of the occurrence and 20-8-1981. The recovered clothes of the prosecutrix and the accused were sent to Chemical Examiner.

3- Dr. Smt. U.K. Joshi, Medical Officer, District Hospital, Uttarkashi medically examined Km. Beenu on 20-3-1981 at about 3-45 P.M. The doctor after examination has formed the following opinion-

4- Secondary sex character was not developed. Clothing were not torn.Undergarments were stained with blood. No external mark of violence was seen on the body. Hymen was no intact. There was fresh tear posterially showing bleeding. One finger inducted easily through vagina. Sweb was taken from vagina and blood stains were sent for pathological examination. In the opinion of the Medical Officer Km. Beena was subjected to rape. X-ray of the prosecutrix was advised to ascertain her age. The Doctor has prepared injury report Ext. Ka.3.

5- Dr. S.S. Aswal, District Hospital Uttarkashi also examined the accused Shabir on 20-3-1981 and found that the accused was aged about 18 years. All the secondary sex characters were well developed. Penis was normal. There was

no smagma on the penis. No blood stains were found on the penis in its public region. No blood stains were on his clothes. No mark of any violence was present on his body. The Medical Officer prepared medical report, Ext. Ka.2.

6- Km. Beenu was referred to the Medical Superintendent, District Hospital, Uttarkashi for her x-ray so as to determine her age. The doctor did not take x-ray of the prosecutrix as he opined that Km. Beenu was in between the age of 8-10 years and the age may be determined by x-ray after the age of 14-15 years. The C.M.O. also issued a certificate, Ext. Ka.4 in this regard.

7- The I.O. after completion of investigation, submitted charge sheet, Ext. Ka. 9.

8- The report of Chemical Examiner was also received and the Chemical Examiner found that the clothes were having blood-stains but no mark of semen was found on these clothes.

9- The Sessions Judge framed charge U/S 376 I.P.C. against the accused. He pleaded no guilty and claimed his trial.

10- The prosecution in order to establish its case produced P.W.1, Jog Bahadur , father of the prosecutrix, P.W.2, Km. Beenu prosecutrix, P.W.3, Dr. S.S. Aswal, who examined the accused, P.W.4, Dr. Smt. U.K. Joshi, who examined the prosecutrix, P.W.5, M.L. Shilpkar, C.M.O. who gave opinion about the age of Km. Beenu and P.W.6, V.P. Kukreti, Investigating Officer of the case.

11- The learned Sessions Judge, on hearing learned counsel for the parties and perusing the evidence on record, found the accused/appellant guilty of offence U/S 376 I.P.C. and sentenced him to undergo R.I. for five years.

12- Feeling aggrieved the accused/appellant preferred this appeal before the Allahabad High Court, which was subsequently transferred to this court after creation of new State.

13- I have heard learned counsel for the parties and perused the record.

14- The medical evidence in this case clearly suggest that Km. Beena daughter of Jog Bahadur Nepali was subjected to rape by the accused – Sabir Ahmad. The prosecutrix – Beena has also been produced as P.W. 1 before the trial court and she has deposed her age as 10 years and has stated that when she had gone to the field for plucking the vegetable on 13.03.1981 accused reached there, it was about 02.00p.m. This witness further deposed that the accused caught hold her and threw her in the nearby bushes where she was subjected to rape.

15- Nothing has come out in the cross-examination of this witness which may suggest that this witness is either telling lie or is falsely implicating the accused – Sabir Ahmad. The statement of the prosecutrix finds complete corroboration with the medical evidence, as the doctor found that the prosecutrix was recently subjected to sexual intercourse. The doctor also found that there was a fresh tear posterially showing bleeding and her undergarments were stained with blood. Further prosecutrix was sent for pathological as well as

radiological examination and after X-ray of the prosecutrix, the doctor opined that her age was about 9 years. The prosecutrix would not have been raped by someone else except the actual culprit who is the accused/appellant. The false implication of the appellant appears to be practically nonexistence as there is no such enmity or ill will between the complainant and the accused, which may result in false implication of the accused/appellant. The testimony of the prosecutrix is quite convincing and does not create any doubt in the mind.

16- I do not find any ground to discard the testimony of the prosecutrix on any count. The evidence on record is sufficient to reach to a definite and irresistible conclusion that the prosecution has succeeded in establishing the guilt of the accused/appellant under Section 376 I.P.C. beyond all reasonable doubt.

17- Learned counsel for the appellant has contended that the accused/appellant Sabir Ahmad was juvenile at the time of the commission of crime, as such, he should have been tried by the juvenile court and the trial is vitiated.

18- In order to appreciate this submission, we have to look into the material available on the record in this case. My attention has been invited towards page 30 ka which is Ext. Kha 1. This document is School Certificate and the age of the accused/appellant in the School Leaving Certificate has been shown as 11 years on 02.07.1997. His date of birth is given in the School Leaving Certificate as 11.09.1965.

19- The plea on behalf of the appellant has never been raised before the trial court that the accused was juvenile at the time of the commission of crime. It is for the first time

that my attention has been invited by the learned counsel for the appellant at the stage of the appeal on the above cited document. Even in the ground of appeal, it is nowhere mentioned that appellant – Sabir Ahmad was juvenile at the time of commission of crime and trial by Sessions judge was vitiated. However, from the perusal of the paper Ext. Kha 1 which is available in the record of the trial court establishes this fact that accused/appellant was below 18 years of age on the date of the incident. The accused/appellant in his statement under Section 313 Cr.P.C. has stated that he was 18 years of age. His statement under Section 313 Cr.P.C. was recorded on 06.09.1982, the incident in this case has taken place on 19.03.1981, therefore, on the basis of the School Leaving Certificate as well as the age disclosed by the appellant in his statement under Section 313 Cr.P.C. it is clear that the accused/appellant was below 18 years of age at the time of incident.

20- In view of the Hon'ble Apex Court decision ***Upendra Kumar Vs State of Bihal*** reported in ***(2005) 3 Supreme Court Cases 592*** the accused/appellant is entitled to the benefit of Juvenile Justice (Care and Protection of Children) Act, 2000 (for short "the Act"), since he was a juvenile on the date of the occurrence and the date of his production before the court. The Hon'ble Apex Court in the aforesaid decision has also taken the reference of other decisions of Hon'ble Apex Court, namely, ***Bhola Bhagat Vs State of Bihar*** reported in ***(1997) 8 SCC 720, Gopinath Ghosh Vs State of W.B.*** reported in ***1984 Supp. SCC 228*** and ***Pradeep Kumar Vs State of U.P.*** reported in ***1995 Supp. (4) SCC 419*** in which the Hon'ble Apex Court has held that the accused who were juvenile on the date of commission of crime, could not be denied the benefit of the provision of the Act then in force.

21- Section 2(k) of the Juvenile Justice (Care and Protection Act of Children) Act, 2000 (for short "the Act") provides that "Juvenile" or "Child" means a person who has not completed eighteen years of age. Therefore, the fact that on the date of occurrence, the appellant had not completed eighteen years of age cannot be doubted as the aspect of age stands fully established on the record.

22- Section 16 of the Act, inter alia, provides that no juvenile shall be sentenced to death of life imprisonment or committed to prison in default of payment of fine or in default of furnishing security. A Juvenile, under the provisions of the Act, can be referred to Juvenile Board for such orders to be passed by the Board as it thinks fit in terms of Section 15 of the Act. Further Section 20 provides for special provision in respect of pending cases. It provides that notwithstanding anything containing in the Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which the Act came into force in that area shall be continued in that court as if the Act had not been passed and if the court find that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provision of the Act, as if it had been satisfied on inquiry under this Act that a juvenile has committed an offence.

23- As this Act came into force on 01.04.2001, therefore, when this Court is deciding the criminal appeal filed by the appellant, the Act has already been in force and in view of the aforesaid provision, the appellant is entitled to the benefit thereof.

24- For the above stated reasons, I therefore, come to the conclusion that the conviction of the appellant – Sabir Ahmad for the offence for which he has been found guilty by the court of sessions is liable to be affirmed. At the same time, however, sentence awarded by the trial court to the appellant deserved to be quashed.

25- Accordingly, the appeal is partly allowed. The conviction of the appellant under Section 376 I.P.C. is maintained but being a juvenile on the date of occurrence his sentence is set aside and he is directed to be released forthwith, if not required in any other case,

26- The accused/appellant is already on bail. He need not surrender. His bail bonds and sureties are discharged.

(B.C. Kandpal, J.)

17.08.2006
ASWAL